

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
OLIVER PETROVICH	:	DETERMINATION
	:	DTA NO. 816544
for Redetermination of a Deficiency or for Refund	:	
of Personal Income Tax under Article 22 of the	:	
Tax Law for the Year 1988.	:	

Petitioner, Oliver Petrovich, Auburn Correctional Facility, 90A0014, P.O. Box 618, Auburn, New York 13024, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the year 1988.

On October 5, 1998 and October 14, 1998, respectively, petitioner, appearing *pro se*, and the Division of Taxation by Terrence M. Boyle, Esq. (Michael J. Glannon, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based upon documents and briefs to be submitted by January 29, 1999, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]). After due consideration of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner is entitled to a refund of New York State personal income tax for the year 1988.

FINDINGS OF FACT

1. Petitioner, Oliver Petrovich, filed a New York State Resident Fast Form Income Tax Return ("Form IT-100") for the year 1988. This return is dated as signed on March 24, 1997. The envelope in which the return was mailed bears a March 26, 1997 United States Postal Service ("USPS") postmark, and the return is indate stamped as received by the Division of Taxation ("Division") on March 31, 1997. Petitioner claimed filing status "1," or "single," on this return. As borne out by a Wage and Tax Statement ("Form W-2") attached to the return, petitioner reported \$24,389.76 as "Wages, salaries, tips, etc." on line two, and reported \$1,486.32 as "New York State tax withheld" on line ten. A letter attached to the return indicates that petitioner was seeking a refund for the year 1988. The dollar amount of the refund was not specified.

2. The Division issued a responding letter, dated June 19, 1997, denying petitioner's claim for refund. In its letter, the Division notes that petitioner's return for 1988 was due on April 15, 1989, but that a search of Division records did not reveal the filing of any return for 1988 prior to the return received by the Division on March 31, 1997. The Division's letter goes on to state that the deadline for filing a claim for refund expired three years from the date the return was due, which in this case was April 15, 1992, that petitioner's return was not filed until March 31, 1997, and that Tax Law § 687 includes no provision for waiver of the statute of limitations as it applies to requests for refunds or credits.

3. Petitioner filed a Claim for Credit or Refund of Personal Income Tax ("Form IT-113-X"), dated July 26, 1997 and received by the Division on July 30, 1997. This claim lists total tax paid of \$1,486.32 (as did petitioner's 1988 return) and, with respect to the amount of credit or refund sought, states as follows: "I filed those IT-100 easy forms, to have you figure it out." Petitioner included an explanation of the basis for his refund claim as follows:

Denial of 1988-State Tax Refund. Because I filed too late, this year, way past the statute [sic] of limitations. But, I have a reasonable excuse, to pursue [sic] a refund.

I'm in prison for killing my parents in 1988, and the prosecution doctors diagnosed [sic] me with a mixed personality disorder, defense doctors, with a mental disorder.

On the outside, my tax returns for refunds were allways [sic] done by some office, together with my parents.

I knew nothing of state tax refunds, until this year, because I filed a Federal refund, only a few years ago.

4. On August 15, 1997, the Division issued a Notice of Disallowance denying petitioner's refund claim in full upon the basis that the claim had not been filed within the later of three years from the date the return was due or two years from the date the tax was paid.

5. Following a conciliation conference, conducted via correspondence, with the Division's Bureau of Conciliation and Mediation Services ("BCMS"), a conciliation order (CMS No. 163293) dated May 15, 1998 was issued. This order denied petitioner's request for refund and sustained the Division's August 15, 1997 Notice of Disallowance. The order also specifies the amount of refund disallowed as \$299.00.

6. Petitioner challenged the disallowance of his claim for refund by filing a petition with the Division of Tax Appeals. In his petition, dated May 20, 1998, and in his subsequent letter-brief and two reply briefs, petitioner argues that his failure to file for the year 1988 was due to special circumstances. More specifically, on October 12, 1989, petitioner was convicted on two counts of second degree murder for the September 24, 1988 shotgun slaying of his parents. Petitioner was sentenced thereafter to 2 consecutive terms of 25 years to life in State prison, and in fact has been incarcerated since the September 25, 1988 date of his arrest for murder. In the context of this proceeding, petitioner maintains that he was unaware of his obligation to file

Federal or state tax returns because his parents had always taken care of making such filings for him. He argues in turn that because of his parents' deaths in 1988 and because he was involved in the ensuing legal proceedings against him in connection therewith, he was neither aware of his obligation to file nor in a position to secure the necessary information with which to make his filings.

7. Petitioner states that he learned of his obligation to file a Federal income tax return from another State prison inmate. According to petitioner, he filed his 1988 Federal income tax return in 1991 and received a refund. However, he claims he was unaware of his State filing obligation until 1997, when he filed his Form IT-100 for 1988 as described above. Petitioner's position is that notwithstanding the lateness of his filing for 1988, he remains entitled to a refund for such year because of the special circumstances described above. In addition, petitioner argues that the Division failed to forward information to him or to inquire about his lack of filing for 1988 prior to the expiration of the statute of limitations. Petitioner maintains that this lack of inquiry by the Division, together with the special circumstances of his arrest, conviction and subsequent incarceration, should excuse the lateness in filing his claim and allow for the refund to be granted under the special refund authority of Tax Law § 697(d).¹

8. The Division maintains that petitioner is not entitled to a refund under Tax Law § 687(a), because this section limits the amount of any refund or credit to the amount of tax paid within the three years immediately preceeding the filing of the claim. According to the Division,

¹ Petitioner also claims that he never received a Notice of Deficiency pursuant to Tax Law § 681 for the year 1988. However, there is no claim by the Division and no evidence in the record that a Notice of Deficiency was, or would have been, issued to petitioner under the circumstances of this case. In fact, there is no dispute that taxes withheld from petitioner's wages exceeded his tax liability for 1988, thus obviating any reason for a Notice of Deficiency and leaving petitioner in a position to receive a refund of his overpayment of tax for such year upon timely claim therefore.

petitioner paid no tax for the year 1988 within the three years preceeding the March 26, 1997 filing of his 1988 return.² The Division also asserts that the special refund authority of Tax Law § 697(d) does not apply because there has been no showing that the amount sought for refund was erroneously or illegally collected.

CONCLUSIONS OF LAW

A. Tax Law § 686 provides, in relevant part, as follows:

(a) General. - The [Commissioner of Taxation], *within the applicable period of limitations*, may credit an overpayment of income tax and interest on such overpayment against any liability in respect of any tax imposed by this chapter on the person who made the overpayment, against any liability in respect of any tax imposed pursuant to the authority of this chapter or any other law on such person if such tax is administered by the [Commissioner of Taxation] and, The balance shall be refunded by the comptroller out of the proceeds of the tax retained by him for such general purpose. Any refund under this section shall be made only upon the filing of a return and upon a certificate of the tax commission approved by the comptroller. The comptroller, as a condition precedent to the approval of such a certificate, may examine into the facts as disclosed by the return of the person who made the overpayment and other information and data available in the files of the [Commissioner of Taxation]. (Emphasis added.)

B. The Division raises no dispute that the amount of tax withheld from petitioner's wages for 1988 exceeded petitioner's tax liability for such year, thus resulting in an overpayment by petitioner. In fact, the Division has calculated such overpayment to be \$299.00, and no dispute has been raised by petitioner against the correctness of this sum. However, the Division has denied petitioner's claim for refund of this overpayment, citing to Tax Law § 687 which, in pertinent part, imposes limitations on credits or refunds of overpayments as follows:

(a) General - Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was

² Although the Division refers to March 31, 1997 as the filing date for petitioner's 1988 return, the envelope in which the return was filed bears a March 26, 1997 USPS postmark, and it is this earlier date which serves as the date of filing (Tax Law § 691[a]).

filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim Except as otherwise provided in this section, if no claim is filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed.

* * *

(e) Failure to file claim within prescribed period. - No credit or refund shall be allowed or made, except as provided in subsection (f) of this section or subsection (d) of section six hundred ninety, after the expiration of the applicable period of limitation specified in this article, unless a claim for credit or refund is filed by the taxpayer within such period. Any later credit shall be void and any later refund erroneous. No period of limitations specified in any other law shall apply to the recovery by a taxpayer of moneys paid in respect of taxes under this article.³

* * *

(i) Prepaid income tax. - For purposes of this section, any tax paid by the taxpayer before the last day prescribed for its payment, any income tax withheld from the taxpayer during any calendar year, and any amount paid by the taxpayer as estimated income tax for a taxable year shall be deemed to have been paid by him on the fifteenth day of the fourth month following the close of his taxable year with respect to which such amount constitutes a credit or payment.

C. Tax Law § 687(a) required petitioner to file his claim for refund within the later of three years from the time his return was filed or two years from the time the tax was paid. The only tax payments by petitioner for the year 1988 were the amounts withheld from his wages.

³The specified exceptions, Tax Law § 687(f) and § 690(d), do not apply to this case. The former (section 687[f]) pertains to the filing of a timely petition contesting a statutory Notice of Deficiency, and allows for a determination that an overpayment has been made for the taxable year in question notwithstanding the determination of a deficiency for such year. The latter (section 689[d]) pertains to circumstances where a Notice of Deficiency is disallowed, in part or in whole, upon review, and provides that the amount so disallowed may be credited or refunded without making a separate claim therefore. Since there is no deficiency determination at issue in this proceeding, neither of these exceptions apply.

Under Tax Law § 687(i), these amounts were deemed paid on April 15, 1989. Petitioner's 1988 return, due to be filed by April 15, 1989, was filed March 26, 1997, and included an attached letter requesting a refund. His formal refund claim, via Form IT-113-X, was filed July 30, 1997. Measured from either the March 26, 1997 date on which the 1988 return and accompanying refund letter was filed, or the July 30, 1997 date on which the formal refund claim was filed, petitioner in fact claimed a refund within three years from the time his 1988 return was filed. Thus, while petitioner's refund claim was not filed within two years after the tax was paid, it was filed within three years after the return was filed. Accordingly, the refund claim was timely filed pursuant to Tax Law § 687(a).

D. Notwithstanding its timeliness, however, petitioner's claim for refund was properly denied by the Division. Where, as here, the refund claim is made within three years from the filing of the return, Tax Law § 687(a) limits the amount of any refund to the amount of tax paid within the three-year period immediately preceding the filing of the refund claim. Since petitioner's payment of tax via withholding occurred more than three years before the filing of his claim for refund, Tax Law § 687(a) bars any refund to petitioner in this case. As to petitioner's argument that he did not know of his obligation to file a return or to claim a refund until many years after the year in issue, and the accompanying claim faulting the Division for failing to advise petitioner of such matters, it is well settled that the Division is not under the duty of personally advising every taxpayer of his or her filing obligations or of potential refunds to which they might be entitled (*see, e.g., Matter of Jones*, Tax Appeals Tribunal, January 9, 1997).

D. Petitioner also claims entitlement to a refund under the special refund authority of Tax Law § 697(d), which provides as follows:

(d) Special refund authority. - Where no questions of fact or law are involved and it appears from the records of the [Commissioner of Taxation] that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the [Commissioner of Taxation] at any time, without regard to any period of limitations, shall have the power, upon making a record of [his] reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor [his] certificate to the comptroller.

E. Petitioner's claim for refund under Tax Law § 697(d) is rejected. There is no argument or evidence to suggest that any of the money in question was erroneously or illegally collected from petitioner, rather than simply withheld from petitioner's wages through normal withholding tax procedures. Accordingly, petitioner does not meet the provisions of Tax Law § 697(d) and is not entitled to a refund thereunder (*see, Matter of Morgan*, Tax Appeals Tribunal, August 20, 1998).

F. The petition of Oliver Petrovich is hereby denied and the Division's August 15, 1997 Notice of Disallowance of petitioner's claim for refund is sustained.

DATED: Troy, New York
June 17, 1999

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE